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No. 270

In the Supreme Court of the United States

OCTOBER TERM, 1959

CECIL W. ARMSTRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 18–24) is reported at 169 F. Supp. 259.

JURISDICTION

The judgment of the Court of Claims (R. 24) was entered on January 14, 1959. A timely motion for rehearing was denied on May 13, 1959 (R. 25). The petition for a writ of certiorari was filed on August 3, 1959, and granted on October 12, 1959 (R. 60). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether materialmen's liens claimed under State law with respect to materials and supplies furnished a contractor for performance of a Government contract subsisted when, in accordance with the contract, title to the property was transferred to the Government upon termination of the contract for default.

2. Whether, assuming the above question is answered in the affirmative, there was any compensable "taking" by the United States of petitioners' materialmen's liens.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Constitution of the United States, Amendment 5, provides, in relevant part, as follows:

> * * *; nor shall private property be taken for public use, without just compensation.

2. Act of August 22, 1911, ch. 42, 37 Stat. 32, 34 U.S.C. (1952 ed.) 582, provides as follows:

> The Secretary of the Navy is authorized in his discretion, to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of the work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: *Provided,* That partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions.

3. Section 13, chapter 178, Revised Statutes of Maine, 1954, provides as follows:

> Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel.

STATEMENT

In March 1954, the United States, through the Department of the Navy and pursuant to invitation for bids, entered into a contract with the Rice Shipbuilding Corporation, East Boothbay, Maine, for the construction of eleven personnel boats, which were to be used aboard and in connection with the operation of combat vessels such as aircraft carriers, battleships and cruisers (R. 10). The contract price for these boats was $175,900 (R. 27). The contractor commenced performance and, as the work progressed, the United States made progress payments based upon estimated percentages of the work completed, less

three percent retained percentages (R. 35, 51–57). As to these progress payments, the contract provided that (R. 36):

> (b) Any and all progress payments made hereunder shall be secured, when made, by a lien in favor of the Government upon the vessels, articles, and things contracted for on account of all payments so made and on all material, equipment and other property acquired for or allocated to the performance of this contract, except to the extent that the Government, by virtue of any other provision of this contract, or otherwise, shall have valid title to such articles, things, materials, or other property as against other creditors of the Contractor. If such property is not identified by marking or segregation, the Government shall be deemed to have a lien upon a proportionate part of any mass of property with which such property is commingled. Any lien provided for by virtue of this Section is paramount to all other liens under the provisions of an Act approved August 22, 1911 (Pub. No. 41, 62nd Cong., 37 Stat. 32; 34 U.S.C. sec. 582).

In August 1955, the contractor was notified by the Contracting Officer of the Bureau of Ships that the United States was terminating the contract for default because of a failure to deliver the boats within the specified time and to make satisfactory progress in performance of the contract.[1] The contractor was

[1] At the time of termination, one vessel had been completed and delivered to the Government, and the remaining ten vessels were in various stages of construction (R. 48).

also informed that the United States would exercise its right under the contract to have the undelivered vessels completed by another shipbuilder, the excess costs of completion to be borne by the contractor. Finally, the contractor was directed, pursuant to Clause 11(d) of the contract,[2] to transfer to the Government title to the partially completed vessels and certain manufacturing materials, and to deliver the vessels and materials to the Navy in the manner and at the time specified by it (R. 47–49).

On August 4, 1955, the contractor executed an "Instrument of Transfer of Title" by which the con-

[2] Clause 11(d), part of the standard form default clause prescribed by the General Services Administration (R. 39), provided as follows (R. 42–43):

"If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called 'manufacturing materials') as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.'"

tractor's right, title and interest in the manufacturing materials were transferred as specified by the Government (R. 49–51). The materials were thereafter removed by the Government from the State of Maine to naval shipyards at Norfolk, New York, and Philadelphia, where the materials were used in completing construction of the vessels (R. 10–11).

Prior to termination of the contract, progress payments in the amount of $141,387.20 were made by the United States to the contractor (R. 11, 54–55). After termination, the cost of completing the boats was $166,627.34, exclusive of the materials transferred from the contractor (R. 12). The added cost of completion of the boats resulted in the assessment of "excess costs" against the contractor in the amount of $146,470.28 (R. 12, 59), no part of which has been paid (R. 12). The contractor, now adjudicated a bankrupt, did not contest the termination of the contract or the assessment of excess costs (R. 12, 20).[3]

Petitioners are twenty-seven suppliers[4] who, at the request of the contractor, furnished materials and equipment in connection with the contractor's part performance of the Navy contract (R. 14–15). The total amount due and owing the petitioners from the contractor is $23,732.72, and claims in that amount were filed by the petitioners with the bankrupt estate (R. 16–17).

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[3] The Government's claim for the excess costs incurred was filed in the bankruptcy court (R. 59, Pet. Br. 6).

[4] Seven of the petitioners are located in Maine. Of the remaining twenty, eight are located in Massachusetts, four in Connecticut, four in New York, and one, respectively, in Illinois, Indiana, Maryland, and West Virginia (R. 6).

Petitioners brought this action in the Court of Claims (R. 1–5) seeking "just compensation" for the alleged "destruction," by the United States, of property rights consisting of statutory liens allegedly acquired under Maine law (R. 4–5). Specifically, petitioners alleged that "[u]pon taking title to and possession of the * * * hulls, materials and supplies, the [United States] became obligated under the Fifth Amendment to the Constitution * * * to pay to each of the plaintiffs just compensation for their respective lien and property rights in the * * * hulls, materials and supplies." (R. 4). The petitioners sought compensation in the amount of $23,732.72 (R.5).

On cross-motions for summary judgment, the Government's motion was granted and petitioners' was denied (R. 24). The Court of Claims held that petitioners acquired no compensable rights against the United States where, as here, the contract provided for passage of title to the Government upon the contractor's default and where, pursuant to that contractual provision, title had in fact passed to the Government.

SUMMARY OF ARGUMENT

This is a suit for just compensation. Petitioners, claiming materialmen's liens under Maine law on property supplied for the performance of a Government contract, seek compensation for the "taking" of those liens—a "taking" which allegedly occurred when, upon termination of the contract for default (as authorized in the contract), title to the property was transferred to the Government by the contractor.

In essence, petitioners urge that the United States, under its contract, did not acquire an absolute title to the property transferred to it, but took it subject to petitioners' subsisting liens. It is argued further that, since petitioners could not enforce their liens against property in the possession of the Government, they were entitled to look to the United States to provide a fund for payment of their state-created lien rights. Having failed to provide this fund, the argument concludes, the Government is now required to pay just compensation. Both the premises and the conclusion of this argument are without merit.

I

A. The United States acquired absolute title to the property in question when it invoked the termination clause of the contract. This clause expressly provides that, if the contractor defaults prior to completion and acceptance of the vessels, the Government may require that the property acquired for the performance of the contract be conveyed to the United States. It was pursuant to this provision of the contract that the contractor, without objection, transferred title to the Government.

The provisions of the contract which (1) give the United States a paramount lien on the things contracted for on account of progress payments, and (2) require the contractor to discharge any lien or right *in rem* cannot be regarded as a recognition by the United States that state-created liens may be asserted against property transferred to the Government pursuant to the termination clause. These provisions

serve only to protect the interests of the Government in circumstances where title has not actually passed to it.

B. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, supports our construction of the contract. There, the Court held that state-created liens could not subsist in relation to property which had passed to the Government pursuant to the provisions of a progress-payments clause. The same result should obtain in circumstances where title has passed to the Government pursuant to a termination clause.

C. Under petitioners' interpretation of the contract, the United States would be required to compensate unpaid materialmen claiming security interests under state law, even if the contractor had completed his work under the contract and the Government had acquired title upon delivery and acceptance of the vessels. This view is untenable. It would require the Government to pay an indefinite amount in excess of its fixed contract price in order to obtain absolute title to the property.

II

In no event was there a compensable "taking" of petitioners' asserted liens, within the meaning of the Fifth Amendment.

A. It is settled that consequential loss or injury resulting from lawful Governmental action does not give rise to a taking in the constitutional sense; it is essential that there be a direct appropriation of property rights. In this case, the Government was dealing solely with the contractor, and it acquired title

and possession of the vessels pursuant to the exercise of its rights under a lawful Government contract. Petitioners' lien rights may thereby have been frustrated, but they were not appropriated.

B. Petitioners recognize that sovereign immunity precludes the assertion of lienholders' rights against property which has been lawfully acquired by the United States. They may not accomplish indirectly, through a just compensation suit in the Court of Claims, what they may not do directly in a suit against the Government in a federal district court.

C. The Government's paramount lien was not lost through merger in the Government's title, and therefore nothing of value was lost by the petitioners. There was no equity in the property transferred to the Government which would have been available for the satisfaction of petitioners' subordinate liens, and, accordingly, there could be no taking.

ARGUMENT

I

THE GOVERNMENT ACQUIRED ABSOLUTE TITLE TO THE PROPERTY TRANSFERRED TO IT PURSUANT TO THE TERMINATION CLAUSE OF THE CONTRACT

The United States entered into a contract for the construction of certain naval vessels. Upon default of the contractor, the United States exercised its contractual right to terminate the contract and require the contractor to transfer title to the uncompleted vessels to the Government. It is undisputed that the contractor has received all the money to which it was entitled for its partial performance of the contract; it is also established that the contractor remains liable for excess costs incurred in completion of the vessels.

Petitioners, who are unpaid materialmen claiming liens created by Maine law,[5] urge that the United States, upon receiving title and delivery of the uncompleted vessels pursuant to its contract, was required to establish a fund for the payment of their materialmen's liens. And, having failed to do so, petitioners contend, the United States is now required to provide just compensation for the "destruction" of their liens.

We do not understand petitioners to argue that the Maine lien statute, in and of itself, created an obligation on the part of the United States to compensate petitioners in the event the United States determined—as it did here—to exercise its termination

[5] We do not brief the question, not reached by the Court of Claims, whether, under the Maine statute as construed by the Maine courts, any or all of the petitioners may claim lienholder rights. It is noteworthy, however, that, although the Maine statute imposes a lien for material furnished to build a ship, it does so only when it appears that the materialmen's contract was made with reference to Maine law. *Mehan* v. *Thompson*, 71 Me. 492. In determining whether any given materialmen's contract is made with reference to Maine law, it is relevant to inquire whether the contract was between Maine citizens, and whether it was actually executed within the state's limits. *Ibid.* In this case, the petitioners' contracts with the Maine contractor are not in the record; twenty of the twenty-seven petitioners, however, are located outside of Maine (see, *supra*, p. 6, fn. 4).

We point out, moreover, that the Court of Claims did not determine whether the petitioners took appropriate steps under Maine law to render enforceable their asserted liens and to give them effect *vis-a-vis* bona fide transferees of the subject property. In this connection, it should be noted that, in order for materialmen's liens to be enforceable under Maine law, it is necessary that a writ of attachment be obtained pursuant to Section 14*ff*., chapter 178 of the Revised Statutes of Maine, 1954. Unless the lien is secured in the precise manner prescribed by Section 14*ff*., the materialmen would stand on the same footing as any other creditor, *Perkins* v. *Pike*, 42 Me. 141, and would clearly enjoy no rights against one who had already purchased the vessel from the builder. *Decring* v. *Lord*, 45 Me. 293.

rights under its contract with the shipbuilder and call for the transfer of title to the uncompleted vessels. State law cannot, of course, impede, diminish, or modify the provisions of a contract entered into by the United States in the performance of one of its constitutional functions. Article 6, Clause 2, of the Constitution; *United States* v. *Allegheny County*, 322 U.S. 174, 183; *United States* v. *Latrobe Construction Co.*, 246 F. 2d 357 (C.A. 8), certiorari denied, 355 U.S. 890; *McKnight* v. *United States*, 259 F. 2d 540 (C.A. 9); cf. *McCulloch* v. *Maryland*, 4 Wheat. 316.

Nor do we understand petitioners to argue that if, under the contract in issue here, the United States acquired an *absolute* title to the transferred materials, the materialmen would be entitled to look to the United States for compensation. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452; cf. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241, 244; *Equitable Surety Co.* v. *McMillan*, 234 U.S. 448, 455; *Hall* v. *American Surety Co. of New York*, 200 U.S. 197, 203.*

Rather, petitioners suggest that particular provisions of the contract manifest a recognition on the part of the United States that state-created liens could subsist on property to which title had passed to the Government pursuant to the termination clause of the contract. In other words, petitioners urge that the

* Petitioners are also precluded from arguing that they had any implied or express contractual right against the United States for the amounts due them from the contractor. See *Dewey Schmoll, Successor, et al.* v. *United States*, 105 C. Cls. 415; *H. Herfurth, Jr., Inc.* v. *United States*, 89 C. Cls. 122.

United States, by virtue of the terms of this contract, did not acquire an absolute title to the property transferred to it upon termination for the contractor's default. And so, the argument continues, petitioners were entitled to look to the United States to provide a fund for payment of their state-created lien rights. In our view, this position finds no support in any of the contractual provisions.

A. THE PERTINENT CONTRACTUAL PROVISIONS

The contract, in Clause 11(a), *supra*, p. 5, fn. 2, makes express provision for the transfer of title to the United States of parts and materials acquired for the performance of the contract upon the happening of stated events prior to completion and acceptance of the vessels. Thus, upon termination and default, the Government may require the contractor "to transfer title and deliver to the Government * * * supplies and materials * * * specifically acquired for the performance" of the contract.

Despite the unambiguous language of this provision, petitioners argue that other provisions of the contract—principally, the "Progress Payments and Lien" clause (*supra*, p. 4) and the "Discharge of Liens" clause (R. 37)[7]—demonstrate a recognition by the United States that state-created liens might subsist.

[7] "DISCHARGE OF LIENS: The Contractor shall immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than [in] favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats. If any such lien or right *in rem* is not immediately discharged, the Government may discharge or cause to be discharged said lien or right *in rem* at the expense of the Contractor."

In other words, those provisions, according to petitioners, precluded the transfer of absolute title to the United States. In petitioners' own language (Br. 23), "[i]f it were otherwise, there would be no necessity to provide for the Government to have a *paramount* lien for partial payments and no need to have a contract provision for the discharge of liens against the boats and materials." (Petitioners' emphasis.) But this is not so.

The provision which gives the United States a paramount lien on the things contracted for on account of partial payments is nowise inconsistent with the title-vesting provision of the termination clause of the contract. The lien is prescribed by the Act of August 22, 1914, 37 Stat. 32, 34 U.S.C. (1952 ed.) 582,[8] *supra*, p. 2, and was designed "to give the fullest protection to the government for progress payments made by it." See *Thomson Mach. Works Co. v. Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913, 916 (N.D. Calif.); see, also, H. Rept. No. 39, 62d Cong., 1st Sess., pp. 2-6.[9] There may be many instances—as petitioners themselves recognize (Br. 22) -where, for practical reasons, the United States, upon default of the contractor, may not choose to exercise its contractual right to obtain title and delivery. Or there may be a refusal on the part of the contractor, arising out of disagreement as to whether default occurred, to abide by the Government's invocation of the termination provision of the contract.

[8] It is now codified in 10 U.S.C. 7521.

[9] For a general discussion of the progress payments clause, see Whelan, *Government Supply Contracts*, 26 Ford. Law Rev. 224 (1957).

In the absence of a contractual provision giving the United States a paramount lien on the materials contracted for, the United States would constantly run the risk of double payment where materialmen and suppliers claimed superior rights, under state law, to the materials in the possession of the contractor. The provision according the Government paramount lien rights in the property is plainly designed, therefore, to protect the interests of the Government in circumstances where title has not actually passed to it. This same purpose is obviously served by the contractual provision requiring the contractor to "immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than [in] favor of the Government, which at any time exists or arises with respect to the boats, and machinery, fittings, equipment or materials for the boats" (R. 37). These provisions can hardly be construed, we submit, as a recognition, on the part of the Government, that state-created lien rights may subsist on property to which the Government has actually acquired title pursuant to its express contract.

B. *UNITED STATES* v. *ANSONIA BRASS & COPPER CO.*, 218 U.S. 452, SUPPORTS THE GOVERNMENT'S POSITION

The *Ansonia Brass* case, heavily relied on by petitioners, does not detract from this construction of the contract and, indeed, gives support to it. In *Ansonia Brass*, three vessels, the BENYUARD, the MOHAWK, and the GALVESTON, were under construction pursuant to Government contracts. The contractor became insolvent and a receiver, appointed by the state court, took

possession of the contractor's property, including the three uncompleted vessels. Suppliers of the contractor asserted liens against the vessels under the lien law of Virginia. As against these claims, the United States claimed title to the BENYUARD under the particular contract clause providing for passage of title to the United States as progress payments were made. The United States did not, however, claim title to the MOHAWK or GALVESTON, or assert that, by reason of the contract provisions relating to those vessels, state-created liens could not subsist. Rather, the Government argued that contractual liens reserved to the United States for progress payments were superior to the supply liens (*id.* at 453–456).

The suppliers contended that, notwithstanding the BENYUARD contract provisions for the vesting of title in the Government, the state statute operated before the right of the United States accrued; that, therefore, the Government took *cum onere;* and that this was the clear intention of the BENYUARD contract. With respect to the MOHAWK and GALVESTON contracts, the suppliers argued that the contractual liens reserved to the Government were, in the absence of a federal statute establishing the paramouncy of the Government's lien, inferior to state-created supply liens (*id.* at 456–560).

This Court held that the state liens could not subsist with respect to the BENYUARD because, under the construction contract, the contractor's title to parts and materials furnished by suppliers was divested in favor of the Government as progress payments were made in the process of construction, 218

U.S. at 470–471. There is no suggestion in the Court's opinion that the Government had acquired anything less than absolute title to the 70% complete BENYUARD. As to the MOHAWK and GALVESTON, the Court ruled that the Government's claim of a superior lien was unsupported, since it was neither provided for by statute nor by the contracts involved (218 U.S. at 472–473).[10]

We submit that the Court's ruling with respect to the BENYUARD should be dispositive here. If suppliers are precluded from asserting state-created lien rights against property to which title has passed pursuant to a progress-payments clause, we see no reason why petitioners, relying on similar state-created lien rights, are not also precluded from asserting them against property to which title has passed to the Government pursuant to a termination clause. It would be incongruous if the applicability of state lien laws were to depend upon the mechanical question of whether title passed to the Government under one type of contractual provision or the other.[11]

[10] Congressional concern over this aspect of the *Ausonia Brass* decision led to the enactment, one year later, of the paramount lien statute, *supra*, p. 2. See H. Rept. No. 39, 62d Cong., 1st Sess., p. 5.

[11] *Thomson Mach. Works Co.* v. *Lake Tahoe Marine Sup. Co.*, 133 F. Supp. 913 (N.D. Calif.), supports this conclusion. In that case, the court was called upon to decide the conflicting claims of a mechanic and the United States to certain propeller shafts which were supplied to the prime contractor for the construction of utility boats under a Government contract. The contract between the Government and the prime contractor contained, as here, a Progress Payments and Liens Clause which gave the Government a paramount lien, and a Clause 11 providing for transfer of title upon the contractor's default.

C. THE LOGICAL CONSEQUENCES OF PETITIONERS' INTERPRETATION OF THE CONTRACT

If petitioners' interpretation of the contract is correct, *i.e.*, that state-created liens subsisted on property to which title was transferred to the Government pursuant to the termination clause, and the Government was therefore required to provide a fund for payment of those liens, we fail to see why the same result should not logically follow in circumstances where there has been no default under the contract and the Government has taken title to the vessels upon delivery and acceptance. Suppose, in this case, that the contractor had not defaulted, that he had completed construction of the eleven personnel boats, and had been paid the full contract price of $175,900. Under petitioners' argument, the Government could not lawfully accept delivery of those boats without providing additional sums of money for the payment of unsatisfied materialmen's claims against the contractor. The mere statement of this interpretation of the contract

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When default occurred and title was transferred to the United States pursuant to Clause 11, the mechanic claimed a lien under California law on the shafts for work done thereon, and brought an action to quiet title and foreclose the lien which allegedly subsisted. In rejecting this claim, the court said (135 F. Supp. at 915):

"Since a transfer of the property under discussion actually took place, title to the propeller shafts vested in the government according to the provisions of the contract. The government's title to the property must prevail over any lien claim on the part of [the mechanic]."

The presence of the Progress Payments and Liens Clause in the contract—which "was to give the fullest protection to the government for progress payments made by it" (135 F. Supp. at 916)—in no way detracted from the absolute title conferred upon the Government pursuant to Clause 11.

demonstrates its weakness; it presumes a deliberate intention on the part of the Government to pay an indefinite sum in excess of its fixed contract price in order to obtain absolute title to the materials contracted for.[12]

We emphasize that there is no dispute in this case that the contractor has received all the money to which it was entitled for partial performance of the contract. Nevertheless, petitioners urge that the contract must be construed as creating an obligation on the part of the Government to pay additional monies to unpaid materialmen claiming rights under state law. There is nothing in the contract to warrant a holding that there was an intention to assume such an untsual risk.

II

EVEN IF PETITIONERS' LIENS SUBSISTED WHEN TITLE AND POSSESSION OF THE VESSELS WERE TRANSFERRED TO THE GOVERNMENT, THERE WAS NO TAKING OF THOSE LIENS IN THE CONSTITUTIONAL SENSE

In Point I, we have urged that the Government acquired absolute title when it exercised its rights under the termination clause of the contract.[13] Here,

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[12] This flies squarely in the face of the Court's ruling in *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 244, that "When laborers and materialmen, however, are unpaid and the work is complete, the government suffers no damage. The work has been done at the contract price. The government cannot suffer damage because it is under no legal obligation to pay the laborers and materialmen."

[13] The Court of Claims interpreted the provisions of the contract as according the United States "inchoate title" to the materials provided thereunder. We suggest that this characterization of the Government's interest in the property means

we argue that in all events there was no compensable taking within the Fifth Amendment.

Petitioners' constitutional argument, reduced to its essentials, is this: Prior to the Government's exercising its contractual right to terminate and call for transfer of title, petitioners had two strings to their bow—(1) they could proceed against the contractor to recover the monies due them, or (2) they could proceed, by way of foreclosure, against the vessels in the possession of the contractor. And, the argument continues, since the Government's immunity from suit extends to its property as well, the transfer of title to the United States deprived petitioners of one of their strings, *i.e.*, the right to foreclose on the property, and for this the Government is required to pay "just compensation". There are several reasons why this argument must fail.

A. THERE WAS NO DIRECT APPROPRIATION OF PETITIONERS' PROPERTY RIGHTS

When reference is made to that part of the Fifth Amendment which forbids the taking of private property for public use without just compensation, it must be remembered that "we are dealing with a constitutional limitation, and there is no surer way to misapprehend its scope than to ignore its history, and treat it as inspired text." (Learned Hand, J., con-

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nothing more than that the petitioners' interest in the materials was always subject to the right of the United States to exercise its contractual right to call for the transfer of title upon termination for default.

curring in *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 97 (C.A. 2), certiorari denied, 346 U.S. 877.)

As the long history of that provision demonstrates, there are two general classes of constitutional takings.

The *first* embraces traditional exercises of the eminent domain power—cases in which Government officials (a) intend to take private property for public purposes pursuant to specific statutory authority, and (b) carry out the formal steps which are part of the condemnation process. In this class of cases, it is the admitted purpose of the Government officials to divest the owner of some legally recognized property interest and to transfer that interest to the United States. This exercise of the eminent domain power is clearly not involved in the present case.

The *second* class, on the other hand, does not depend upon the intention of the Government officials. Whatever the official intention may be, certain governmental actions may entail such an actual invasion of property rights that a constitutional taking may be implied, if the actions are not to be held invalid. See *Penna. Coal Co.* v. *Mahon*, 260 U.S. 393, 413; *Block* v. *Hirsh*, 256 U.S. 135, 155–56; *United States* v. *General Motors Corp.*, 323 U.S. 373, 378; *United States* v. *Dickinson*, 331 U.S. 745, 748; *United States* v. *Pewee Coal Co.*, 341 U.S. 114.[11] Presumably, this is the class

[11] The prime instance, in federal eminent domain, is the destruction of privately owned land by flooding. *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 809–810. See, also, *United States* v. *Causby*, 328 U.S. 256 (taking by flights of governmental aircraft); and *Portsmouth Co.* v. *United States*, 260 U.S. 327 (repeated firings of projectiles over owner's land).

of constitutional taking into which petitioners would fit this case.

This Court has long recognized, however, that a prerequisite to such a claim is that it be attributable to a direct appropriation of property rights and not to consequential injuries resulting from the exercise of lawful power. *Legal Tender Cases*, 12 Wall. 457, 551; *Louisville & Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467, 484; *Omnia Co.* v. *United States*, 261 U.S. 502, 510; see, also, *Mitchell* v. *United States*, 267 U.S. 341; *United States* v. *Carver*, 278 U.S. 294, 300; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281–283; *United States* v. *Causby*, 328 U.S. 256, 262.

Thus, in *Omnia Co.* v. *United States*, 261 U.S. 502, the Court held that a frustration of a contractual right to purchase steel because of Government requisition of the steel company's product was not a taking compensable under the Fifth Amendment. "[F]or consequential loss or injury resulting from lawful governmental action," the Court said, "the law affords no remedy." *Id.* at 510. In language pertinent here, the Court went on to explain (*id.* at 511):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

And in *Mitchell* v. *United States*, 267 U.S. 341, the owner was denied compensation for the destruction of his business, which resulted from the taking of his land for a public project, even though the business could not be reestablished elsewhere. This Court, after noting that "settled rules of law" precluded a consideration of "consequential damages" for losses of a business or its destruction, stated (267 U.S. at 345):

> No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land * * *.[15]

So, too, in *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282, this Court, quoting *Omnia Co.* v. *United States*, *supra*, p. 513, reemphasized that "it is well settled * * * that, 'Frustration and appropriation are essentially different things' ", and that, for the former, the United States is not required to make compensation. See, also, *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

This case falls squarely within those settled principles. The United States did not appropriate, either intentionally or unintentionally,[15a] petitioners' lien rights. The Government was dealing solely with the

[15] The owner had been compensated for the taking of his land.

[15a] Indeed, it is not alleged that the Government had any notice of the liens. And see note 5, p. 11, *supra*.

contractor pursuant to a lawful contract entered into under the provisions of the Defense Production Act (R. 27). And it was pursuant to the exercise of that lawful governmental action that the United States acquired title and possession of the vessels. In no constitutional sense, we submit, was there any appropriation of petitioners' property rights.

B. PETITIONERS' INABILITY TO ENFORCE THEIR LIEN RIGHTS AGAINST THE GOVERNMENT DOES NOT GIVE RISE TO A COMPENSABLE TAKING

From at least the time of *The Siren*, 7 Wall. 152, it has been settled that the transfer to the Government of property upon which liens exist does not, *ipso facto*, extinguish the lien claims, but merely renders them unenforceable by reason of sovereign immunity. See, also, *United States* v. *Alabama*, 313 U.S. 274, 280–281; *United States* v. *City of Buffalo*, 54 F. 2d 471 (C.A. 2), certiorari denied, 285 U.S. 550; *United States* v. *John K. & Catherine S. Mullen Benevolent Corp.*, 63 F. 2d 48 (C.A. 9), affirmed *sub nom. Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89; *United States* v. *Anderson Cottonwood Irr. Dist.*, 19 F. Supp. 740 (N.D. Cal.). It has never been held, so far as we have been able to ascertain, that the inability to enforce a property right against the Government without its consent may serve as the basis of a just compensation suit for the value of that property right. On analysis, this is precisely what petitioners seek to accomplish.

In Paragraph 8 of petitioners' complaint, it is alleged that (R. 4):

> Upon taking title to and possession of the said hulls, materials and supplies, the defendant

became obligated under the Fifth Amendment to the Constitution of the United States to pay to each of the plaintiffs just compensation for their respective lien and property rights in the said hulls, materials and supplies.

The unmistakable import of this allegation—which is the heart of petitioners' suit—is that, by virtue of the petitioners' inability to enforce its lien rights against the United States, the United States became obligated to make compensation for the value of those rights.[16] But, as this Court recognized in *Lynch* v. *United States*, 292 U.S. 571, 582, "[t]he sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced." The Government's immunity would be meaningless if a party were to be able to accomplish indirectly—in a suit for just compensation—what he is unable to accomplish directly in a suit against the sovereign.[17]

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[16] Petitioners' allegation in the preceding paragraph of their complaint (Paragraph 7, R. 4), *i.e.*, that the Government removed the property "from the State of Maine, thereby depriving the plaintiffs of their right to exercise their liens", plainly does not add anything to petitioners' claim. Once the United States acquired title to the property, the petitioners would be precluded from proceeding against the property whether it were located in Maine or elsewhere.

[17] Cf. *Lynch* v. *United States*, *supra*, at 582:

"The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away."

United States v. *John K. & Catherine S. Mullen Benevolent Corp.*, 63 F. 2d 48 (C.A. 9), affirmed *sub nom. Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, is precisely in point. There, the plaintiff brought an action under the Tucker Act for the taking of a lien allegedly held on property which was acquired by the Government. The court held (1) that the plaintiff did not have a lien on the property at the time of its transfer to the Government, and (2) that, even if the plaintiff had a valid lien on the property, there would still not be a taking of plaintiff's property. The only loss that plaintiff sustained was the disability to enforce his lien against the Government. In holding that this did not constitute a taking of property by the Government which would give rise to a cause of action, the court said (63 F. 2d at 56):

> It is therefore argued in effect that inasmuch as the government has not consented to the foreclosure of lien upon its land it must be deemed to have agreed to pay the amount which would be realized from such a foreclosure. In short, it is contended that the refusal of the sovereign to permit a foreclosure suit to enforce a lien against property acquired by it for public purposes amounts to a taking of the lien from which taking an implied contract to pay therefor arises from which a consent to sue the United States is derived. Thus, from a refusal (or failure) to permit a suit to be brought against the United States a consent thereto is to be implied. This does not seem to be a tenable position.

Petitioners reliance on *Thibodo* v. *United States*, 187 F. 2d 249 (C.A. 9), is mistaken. That case arose

out of a statutory condemnation proceeding involving land in California to which, pursuant to the filing of a Declaration of Taking, the United States had acquired title in fee simple absolute.[18] Thibodo was the owner of certain municipal street improvement bonds which, under California law, constituted a lien on the lands involved. The municipality, under the local law, was not liable on the bonds. California law afforded no remedies to the bondholders except an action to foreclose on the land by the municipality or the bondholder. Cal. Streets and Highways Code, §§ 6500, 6610; see *Thibodo* v. *United States*, 134 F. Supp. 88, 94 (S.D. Cal.).

Thibodo had not been made a party to the condemnation proceeding. Claiming that the United States took his interest in the property without paying just compensation, he instituted suit under the Tucker Act for the value of his bonds. The Government defended on the grounds that (1) the plaintiff was not a necessary party to the condemnation proceeding and (2) the Government had no notice of the plaintiff's lien. The court of appeals held, *first*, that, under California law, "a lienholder has a present proprietary interest

[18] The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258(a), provides in pertinent part that "Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto * * *."

in the subject matter of land sought to be taken by eminent domain proceedings which confers a right to have such interest considered and determined in said action." 187 F. 2d at 256. *Second,* the court held that "the lien here involved is a subject of public record, charging a subsequent condemnor with constructive notice thereof. Armed with this knowledge, the amount of the lien could have been withheld for its rightful claimant" (*id.* at 255).

An entirely different situation is, of course, presented in this case. In the first place, assuming that petitioners' liens subsisted, they were not terminated upon transfer to the Government but merely rendered unenforceable by reason of the Government's immunity from suit. See *supra,* pp. 24–26. Secondly, petitioners were not left without remedy when the vessels were transferred to the United States. Unlike Thibodo, they could still sue on the debt owing to them and they have, in fact, filed claims in the bankruptcy proceeding. And, finally, it has never been alleged that the United States had either actual or constructive notice of petitioners' liens. Indeed, the Maine statute does not provide for the recording of such liens.[19]

[19] Cf. *Thibodo* v. *United States,* 187 F. 2d 249, 256 (C.A. 9): "Since many western states, with their scores of municipalities, make use of similar plans in providing for a means of payment for improvements, it is not an unreasonable burden to require the condemnor with knowledge of a lien to make inquiry into the records of such matters, where it is clear that such a public record is required to be maintained. This is a normal part of the process of determining the proper parties to whom the award is to be made."

C. PETITIONERS' LIENS WERE SUBORDINATE TO THE GOVERNMENT'S LIEN

There is still another ground upon which the decision below may be sustained. Under the Progress Payments and Liens Clause of the contract (R. 35) and 34 U.S.C. (1952 ed.) 582, *supra*, p. 4, the progress payments in the amount of $141,387.20 made to the contractor gave rise to a lien in favor of the Government that is paramount to "all other liens." Thus, even if petitioners had liens on the material and vessels, they were subordinate to the Government's lien.

Attempting to meet this argument, petitioners contend (Br. 30) that the "paramount lien" given to the Government by statute and contract was lost through merger in the Government's title. We dispute this. It is generally true, under the equitable doctrine of merger, that where the owner of a lien upon an estate acquires the fee, a merger results. But it has been repeatedly held that where "there is any reason for keeping [the lesser estate] alive, such as the existence of another encumbrance, equity will not destroy it" but will preserve the separate existence of the two estates. 1 Pomeroy, *Equity Jurisprudence* (5th ed.), § 791. And "[e]quity will not use merger if serious injustice would arise or intent be obviously frustrated." 1 Bogert, *Trusts and Trustees*, § 129; see, also, *In re Phipps' Will*, 157 N.Y.S. 2d 14, 138 N.E. 2d 341; *Morgan* v. *Murton*, 131 N.J. Eq. 481, 26 A. 2d 45; 1 Tiffany, *Real Property* (3d ed.), § 286.

The presumption of an intent to preserve the encumbrance alive may be inferred "from the circum-

stances of the case, from the position of the owner's property, *and especially from the fact that a merger would let in other charges or encumbrances.*" 3 Pomeroy, *Equity Jurisprudence* (5th ed.) § 791, and cases there cited (emphasis added).

We need hardly labor the point that it was obviously not the intention of the Government contracting officers that the United States, upon termination of the contract for default, should enjoy less rights than it had prior to termination. In the circumstances of this case, there is a clear reason for keeping the lesser estate alive and, therefore, there can be no merger so as to extinguish the Government's paramount lien.

In view of the paramountcy of the Government's lien on the contractor's property, the petitioners cannot seriously complain that anything of value was taken from them. In this connection, the petitioners recite that (Br. 34):

> As a practical matter, the Government was unjustly enriched at the expense of the petitioners, for the contractor's equity of $57,158.03 in the property * * * was more than sufficient to pay the $23,732.72 claimed by petitioners.

But the contractor had no "equity" in the property whatsoever. It is undisputed that the contractor received all the money to which it was entitled and, indeed, remains indebted to the United States in the amount of $146,470.28 (R. 11).

Moreover, petitioners base their computation of this "equity", not on the contract price and the percentage of completion of the contract, but, rather, upon the

amount which the contractor allegedly paid for the labor and materials which went into the work. This, however, ignores the Government's agreement with the contractor; it converts a fixed-price contract into a cost contract, which is certainly not what the Government bargained for. Since there was no "equity" in the property transferred to the Government which would have been available for the satisfaction of petitioners' liens, there could be no taking.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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